SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 246

PAUL W. DIEHL, JR., PETITIONER,

vs.

LEHIGH VALLEY RAILROAD CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Proceedings in the U.S.C.A. for the Third Circuit	1	1
Appendix to brief for appellant	1	1
Docket entries	1	1
Complaint	3	3
Motion to dismiss	7	7
Affidavit in support of defendant's motion to dismiss	7	7
Memorandum of agreement covering seniority status of employees, etc.	13	13
Memorandum of agreement relating to seniority status of Carmen Helpers, etc.	16	16
Agreement between the Lehigh Valley Railroad Co. and System Federation No. 96, etc.	21	21
Counter affidavit	24	24
Order for leave to intervene	26	26
Motion of intervening defendants to dismiss complaint	27	27

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 23, 1954

—8647

	Original	Print
Appendix to brief for appellant—Continued		
Motion for summary judgment	29	29
Affidavit in support of plaintiff's motion for summary judgment	29	29
Opinion on motion to dismiss, Kirkpatrick, J.	35	35
Judgment	39	39
Joint appendix to separate briefs of appellees	41	41
(See Separate Index)	42	42
Opinion, Biggs, C. J.	53	53
Judgment	61	60
Clerk's certificate (omitted in printing)	62	
Order extending time to file petition for writ of certiorari	63	61
Order granting certiorari	67	61

APPENDIX

1. IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 12996

PAUL W. DIEHL, JR.	G. A. Gleeson, Esq.
v.	
LEHIGH VALLEY RAILROAD COMPANY	Harry E. Sprogell, Esq.
SYSTEM FEDERATION NO. 96 of THE RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, PAUL C. YOST, WARREN A. SHUPP, STANLEY C. BRINKMAN and STEPHEN J. PAVLINSKY, *Intervening Defendants*	William M. Gerber, Esq.

Docket Entries

1951

1	Nov. 28	Complaint filed.
	Nov. 28	Summons exit.
2	Dec. 18	Summons returned: "on Dec. 5, 1951 served and filed."
3	Dec. 26	Stipulation of counsel extending time for filing Answer to January 21, 1952 and Order of Court approving same filed. Noted 12/27/51.

1952

4	Jan. 21	Stipulation of counsel extending time for filing Answer to February 4, 1952 and

		Order of Court approving same filed. Noted 1/22/52.
5	Feb. 4	Motion to dismiss and notice of motion filed.
6	Feb. 4	Affidavit in support of motion to dismiss, filed.
7	Apr. 7	Motion of System Federation No. 96 of the Railway Employes' Department of the American Federation of Labor and Paul C. Yost, Warren A. Shupp, Stanley C. Brinkman and Stephen J. Pavlinsky for leave to intervene, filed.
8	Apr. 7	Order of Court granting leave to intervene as to System Federation No. 96, etc. *et al.* filed. Noted and Notice mailed 4/8/52.
9	Apr. 7	Motion of Intervening defendants to dismiss filed.
	Sept. 9	Argued Sur Motions to Dismiss—cont'd to 10/20/52.
10	Oct. 14	Motion for Summary Judgment filed.
11	Oct. 14	Affidavit in support of Plaintiff's Motion for Summary Judgment filed.
12	Oct. 14	Counter Affidavit of Paul W. Diehl, Jr. filed.
13	Oct. 17	Counter Affidavit Opposing Plaintiff's Motion for Summary Judgment, filed.
	Oct. 20	Hearing Sur Motions to Dismiss (submitted on briefs) C.A.V.
14	Nov. 12	Opinion, Kirkpatrick, J., dismissing complaint filed.

15	Nov. 12	Judgment Dismissing Action filed. 11/13/52 Noted and Notice mailed.
16	Dec. 10	Notice of Appeal by Plaintiff filed. 12/11/52 Copy to Harry E. Sprogell.
17	Dec. 10	Copy of Clerk's Notice to U. S. Court of Appeals filed.
18	Dec. 29	Order Extending to 3/10/53 Time Within Which to Perfect Record on Appeal filed. 12/30/52 Noted and Notice mailed.

2. [Caption omitted]

Complaint

1. The jurisdiction of this Court is founded, and this cause of action arises under the provisions of the Act of Congress known as the Selective Training and Service Act of 1940, as amended, U.S.C.A., App. Sec. 308E.

2. Plaintiff is a citizen of the United States of America and of the State of Pennsylvania, residing at 1045 E. Gordon Street, Allentown, Pennsylvania.

3. Defendant, the Lehigh Valley Railroad Company, is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and doing business in the Eastern District of Pennsylvania.

4. The plaintiff was first employed by the defendant company June 24, 1942, as a Car Repair Helper, and continued in that capacity until February, 1943, when he was promoted to the position of Set-up Car Inspector and worked on an assigned job other than temporary until April 15, 1943, when said plaintiff was drafted into Military Service.

5. On or about the 20th day of October, 1945, plaintiff was honorably discharged from the United States Air Force and returned to work for the defendant company on or about November 11, 1945, as a Set-up Car Inspector.

6. On November 1, 1942, a Collective Bargaining Agreement effective November 1, 1942, between the defendant and System Federation No. 96, Railway Employes' Department, American Federation of Labor, covered the position which plaintiff left to enter Military Service.

7. A Collective Bargaining Agreement between the same parties aforementioned was entered into on August 29, 1944, covering the seniority status of employees in the mechanical crafts who have been promoted to mechanics from apprentices, helpers and coach cleaners, and on March 1, 1949, the defendant entered into a Memorandum Agreement with the Brotherhood of Railway Carmen of America relating to the seniority status of carmen helpers promoted into the position of temporary Carmen Mechanic under the provisions of Memorandum of Agreement with System Federation No. 96, dated August 29, 1944, heretofore mentioned, paragraph "Second" being set forth as follows:

> "A carman helper, who has qualified as carman mechanic, as provided in Section First hereof, and is presently working on position of a temporary carman mechanic on the effective date of this agreement, shall be given the opportunity to make

an election within fifteen days after the date of his being notified of having worked 1160 days as a temporary carman mechanic to be placed on the permanent carman mechanics' roster with seniority date as of the effective date of this agreement in the order with other men in which he completed 1160 days' experience as provided in Section First hereof, and if so electing shall forfeit his seniority as carman helper. The election by employee provided herein must be submitted to local management officer in writing, bearing his personal signature and witness thereto, and copy furnished to local committee.

8. On January 10, 1949, plaintiff completed his 1160 days, and within 15 days thereafter, in accordance with Agreement dated March 1, 1949, between defendant and Brotherhood of Railway Carmen of America, exercised his election, in writing, to be placed on the permanent Carman Mechanics Roster.

9. In June, 1949, the Bethlehem Car Inspectors Seniority Roster was posted reflecting seniority status effective March 1, 1949. On that list, there appeared the following names, with seniority in the order in which they appear:

WARREN SHUPP
STANLEY BRINKMAN
STEVE PAVLINSKY
PAUL W. DIEHL, JR.

10. Plaintiff states that if his employment had not been interrupted by his service in the Armed Forces, to wit: from April 15, 1943, to November 11, 1945, he

would have completed his 1160 days on June 1, 1946, and, therefore, claims seniority over the aforesaid Warren Shupp, Stanley Brinkman and Steve Pavlinsky.

11. Plaintiff requested of defendant that he be assigned the seniority status that would have been granted him, except for the interruption of employment caused by his service in the Armed Forces. Defendant refused, and still refuses to grant plaintiff the relative seniority standing to which he would have been entitled, if his employment had not been interrupted by his service in the Armed Forces as heretofore set forth in paragraph 10.

WHEREFORE, Plaintiff demands that defendant, the Lehigh Valley Railroad Company, be required to accord to the plaintiff the seniority to which he would have been entitled had his employment not been interrupted with the defendant by his services in the Armed Forces, as aforementioned, and that plaintiff be granted such other relief as is equitable and just.

/s/ GERALD A. GLEESON
Gerald A. Gleeson
United States Attorney

/s/ EDWARD A. KALLICK
Edward A. Kallick
Assistant United States Attorney

3. [Caption omitted]

Motion to Dismiss

The defendant moves the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against defendant upon which relief can be granted for the reasons among others:

A. Plaintiff was restored on November 12, 1945 to the position which he had left and remained in that position for more than one year;

B. The position of temporary car inspector was not one in which plaintiff was protected by the Selective Service and Training Act of 1940.

2. To dismiss the action because the Court has no jurisdiction over the subject matter of the Complaint for the same reasons.

Signed: HARRY E. SPROGELL

Harry E. Sprogell
2301 Packard Building
Philadelphia 2, Penna.
Attorney for Defendant

4. [Caption omitted]

Affidavit in Support of Defendant's Motion to Dismiss

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

C. L. WAGNER, being duly sworn according to law, deposes and says as follows:

I am Chief of Personnel of Lehigh Valley Railroad Company, defendant in this case, and am duly author-

ized on its behalf to make this affidavit in support of a motion to dismiss the Complaint.

Attached to this affidavit are true and correct copies of the following documents pertinent to the plaintiff's rights:

Agreement effective November 1, 1942, between Lehigh Valley Railroad Company and System Federation No. 96, Railway Employees' Department, American Federation of Labor ("1942 Agreement")

Memorandum of Agreement dated August 29, 1944, between the same parties ("1944 Agreement")

Memorandum of Agreement dated March 1, 1949, between Lehigh Valley Railroad Company and Brotherhood Railway Carmen of America, one of the crafts forming System Federation No. 96.

After Paul W. Diehl, Jr., was employed by the defendant on June 24, 1942 the 1942 Agreement covered the status and rights of a number of crafts including that of carman. By the terms of the Agreement (Rule 27) reduction and expansion of working force in the crafts covered by the Agreement were to be accomplished on the basis of seniority. Among the crafts covered by the Agreement the carmen were divided for purposes of seniority into four subdivisions under the provisions of Rule 31, reading as follows:

"Seniority of employes in each craft covered by this agreement shall be confined to the point employed in the Maintenance of Equipment Depart-

ment and there shall be four subdivisions of the Carmen as follows:

Pattern Makers
Upholsterers
Painters
Other Carmen

"The seniority lists will be open to inspection and copy furnished the committee.

"Rosters will be compiled and posted in January of each year and will be open for correction for a period of sixty (60) days after being posted. If no exceptions are taken to a roster date within the sixty day period after it is first posted, the date will be considered as correct and not changed thereafter. Copy of the roster of each point will be mailed to Secretary of the Federated Shop Craft Committee."

Separate rosters were maintained for each sub-division of the carmen. Seniority on those rosters was determined by date of first entry on the roster. Seniority accumulated on one roster did not carry to another roster if a man caused his name to be changed from one to another. No man could maintain his name on more than one roster.

Among the special rules of the 1942 Agreement were certain rules for carmen of which Rule 120 "Qualifications" reads as follows:

"Any man who has served an apprenticeship or who has had four (4) years practical experience at carmen's work and who with the aid of tools, with

or without drawings, can lay out, build or perform the work of his craft or occupation in a mechanical manner, shall constitute a carman."

In addition to the group of fully qualified carmen there were certain subordinate classifications established by the 1942 Agreement including the classification of carman helper (Rule 123). In this sub-classification also a seniority roster was maintained. Seniority on this roster was governed by principles identical with those which have been stated above for the subdivision rosters. When Diehl was employed, his name was entered on the roster of carmen helpers and until further assignment he performed the duties of a carman helper.

On February 19, 1943, Diehl was assigned temporarily to perform the duties of a carman and continued to perform those duties until the time when he entered the Armed Forces. The phrase "Set-up" which is used by Diehl in paragraph 4 of the Complaint to describe his position as car inspector in railroad terminology has the same meaning as "temporarily advanced". The advancement or Set-up of Diehl and other carmen helpers was made because of war-time emergencies under agreement between the defendant and System Federation No. 96, evidenced by the 1944 agreement. This is the agreement referred to in paragraph 7 of the Complaint as covering seniority status of employees in the mechanical crafts. Paragraphs 4 and 11 of that Agreement read as follows:

"4. Helpers in any craft promoted to mechanics' positions subsequent to January 1, 1940, will

be placed on a desk seniority roster as of the date they were promoted; but this will not affect their helpers' seniority date; they to be carried on the regular helpers' roster as of their original date."

* * * *

"11. Question of disposition of helpers promoted to mechanics in any craft, subsequent to January 1, 1940, will be disposed of between the General Committee and the Management at the expiration of the present emergency."

During the performance of his duties as a carman helper temporarily set-up or advanced to perform the duties of a carman, Diehl and all other similarly Set-up remained on the roster of carmen helpers. Their names were not entered on the roster of carmen. They acquired no seniority as carmen and they had no right to be placed upon the carmen's roster. Diehl and all other carman helpers temporarily Set-up to perform the duties of carmen retained whatever seniority they had on the carmen helper roster.

When Diehl was re-employed on November 12, 1945, following his return from service in the Armed Forces he retained the precise position and seniority on the roster of carmen helpers which he had at the time when he had entered the Armed Forces and he was again temporarily advanced to perform the duties of a carman.

No carman helper Set-up or advanced temporarily since 1940 to perform temporarily the duties of a car-

man has acquired any seniority as a carman or been permitted to be listed on the carmen roster except under the provisions of the 1949 Agreement. The attention of the Court is particularly called to the following provisions of paragraph SECOND of the 1949 Agreement:

> "A carman helper, who has qualified as carman mechanic, as provided in Section First hereof, and is presently working on position of a temporary carman mechanic on the effective date of this agreement, shall be given the opportunity to make an election within fifteen days after the date of his being notified of having worked 1160 days as a temporary carman mechanic to be placed on the permanent carman mechanics' roster with seniority date as of the effective date of his agreement in the order with other men in which he completed 1160 days' experience as provided in Section First hereof, and if so electing shall forfeit his seniority as carman helper. The election by employee provided herein must be submitted to local management officer in writing, bearing his personal signature and witness thereto, and copy furnished to local committee."

Reference to 1160 days is to a definition by agreement between defendant and System Federation No. 96 of the four-year requirement of Rule 120 of the 1942 Agreement.

The provisions of paragraph SECOND of the 1949 Agreement as applied to carmen helpers whose 1160

days of service as temporary carmen mechanics have not been continuous is exactly the same whether the interruption was because of service in the Armed Forces or because of illness or because of leave of absence or for any other reason. Non-veteran employees whose service was interrupted by illness or leave of absence could not apply the time that they were absent against the 1160-day requirement.

/s/ C. L. WAGNER

Sworn to and subscribed before me this 18th day of January A.D. 1952.

(SEAL) /s/ GEORGE C. HAMM
Notary Public
Notary Public, State of New York.
Qualified in Queens County.
No. 41-6749300—Cert. Filed with N. Y. Co. Clerk and Register. Commission Expires March 30, 1952.

MEMORANDUM OF AGREEMENT COVERING SENIORITY STATUS OF EMPLOYEES IN THE MECHANICAL CRAFTS WHO HAVE BEEN PROMOTED TO MECHANICS FROM APPRENTICES, HELPERS AND COACH CLEANERS.

1. Helpers in any craft promoted to mechanic's position prior to January 1, 1940, will be placed on the mechanics' seniority roster as of the date they were first promoted to mechanics.

2. Apprentices who have not finished their apprenticeship and who have been advanced to perform mechanical work will be given their seniority as me-

chanics from the date of advancement, upon the completion of their four (4) years' apprenticeship.

3. Apprentices advanced to mechanics before the completion of their training course must keep up currently the lessons required of them in accordance with the rules governing apprentices.

4. Helpers in any craft promoted to mechanics' positions subsequent to January 1, 1940, will be placed on a desk seniority roster as of the date they were promoted; but this will not affect their helpers' seniority date; they to be carried on the regular helpers' roster as of their original date.

5. On account of the necessity to temporarily advance apprentices and helpers to mechanics' positions, it is agreed that the following procedure will be followed in making such advancements.

6. Regular apprentices, who have served three (3) years or more of their apprenticeship, will be advanced first.

7. Helper apprentices, who have served two (2) years or more of their apprenticeship, will be advanced next.

8. Regular apprentices, who have served two (2) years or more of their apprenticeship, and helper apprentices, who have served one (1) year or more of their apprenticeship, will be advanced next.

9. Qualified helpers having two (2) years or more experience as mechanics, or as helpers, will be advanced next.

10. Local Management and Local Committees will mutually agree on the employees to be advanced and demoted, subject to appeal to the General Chairman and the General Management.

11. Question of disposition of helpers promoted to mechanics in any craft, subsequent to January 1, 1940, will be disposed of between the General Committee and the Management at the expiration of the present emergency.

12. This Memorandum of Agreement supersedes all previous Memorandums of interpretations thereto, covering the promotion of apprentices and helpers.

FOR MECHANICAL CRAFTS SYSTEM FEDERATION NO. 96:

/s/ JOSEPH P. MCSPARRON
Int. Assn. Machinists

CHARLES GRAHAM
Int. Bro. Boilermakers, ISB&H

BRUCE L. JENNINGS
Int. Bro. Blacksmiths, D. F. & H.

LEON E. GORSKI
Sheet Metal Workers Int. Assn.

CARL K. SMITH
Int. Bro. Electrical Workers

GEO. E. SELLERS
Bro. Railway Carmen of America

JOHN J. WASLOSKI
President, System Federation No. 96

FOR LEHIGH VALLEY RAILROAD COMPANY:

/s/ J. N. HAINES
Asst. to General Manager

Dated August 29, 1944

MEMORANDUM OF AGREEMENT RELATING TO SENIORITY STATUS OF CARMEN HELPERS PROMOTED TO THE POSITION OF TEMPORARY CARMAN MECHANIC UNDER THE PROVISIONS OF MEMORANDUM OF AGREEMENT, DATED AUGUST 29, 1944 (GENERALLY KNOWN AS THE UPGRADING AGREEMENT) BETWEEN THE LEHIGH VALLEY RAILROAD COMPANY AND SYSTEM FEDERATION NO. 96, RAILWAY EMPLOYEES' DEPARTMENT, AMERICAN FEDERATION OF LABOR.

IT IS AGREED:

To decide the seniority status of carman helpers promoted to temporary carman mechanics under Memorandum of Agreement dated August 29, 1944, in accordance with the provisions of Item 11 thereof, reading:

> "Question of disposition of helpers promoted to mechanics in any craft, subsequent to January 1, 1940, will be disposed of between the General Committee and the Management at the expiration of the present emergency."

the following will apply:

FIRST:

A carman helper, who was upgraded under the provisions of the Memorandum of Agreement dated August 29, 1944, and who has worked a total of 1160 days at a temporary carman mechanic's rate of pay from date of first upgrading to temporary carman mechanic, which date shall be that subsequent to January 1, 1940, shall be considered eligible to accept or reject permanent carman mechanic seniority date in the following manner:

SECOND:

A carman helper, who has qualified as carman mechanic, as provided in Section First hereof, and is presently working on position of a temporary carman mechanic on the effective date of this agreement, shall be given the opportunity to make an election within fifteen days after the date of his being notified of having worked 1160 days as a temporary carman mechanic to be placed on the permanent carman mechanics' roster with seniority date as of the effective date of this agreement in the order with other men in which he completed 1160 days' experience as provided in Section First hereof, and if so electing shall forfeit his seniority as carman helper. The election by employee provided herein must be submitted to local management officer in writing, bearing his personal signature and witnessed thereto, and copy furnished to local committee.

THIRD:

A carman helper who becomes qualified as a carman mechanic, as provided in Section First hereof, subsequent to the effective date of this agreement, shall be entitled to elect within fifteen days after notice thereof to be placed on the permanent carman mechanics' roster with seniority date as of day following that on which he completed 1160 days' experience as provided in Section First hereof, and if so electing shall forfeit his seniority as carman helper. The election by employee provided herein must be submitted to local management officer in writing, bearing his personal signature and witness thereto, and copy furnished to local committee.

FOURTH:

A carman helper who, subsequent to January 1, 1940, was promoted to temporary carman mechanic and who presently is not working on a carman mechanic's position, having been demoted to carman helper position or furloughed as such, shall be given the opportunity to make an election within fifteen days after the effective date of this agreement of his desire to have his days of service rendered at a temporary carman mechanic's rate of pay subsequent to January 1, 1940 counted to qualify him for a carman mechanic's seniority date. If he so elects and has the required number of days to qualify as a carman mechanic as provided in Section First hereof, he shall be placed on the permanent carman mechanics' roster with seniority date as of the effective date of this agreement in the order with other men in which he completed 1160 days' experience as provided in Section First hereof, and if so electing shall forfeit his seniority as carman helper.

If he so elects, but does not have the required number of days to qualify as a carman mechanic, as provided in Section First hereof, his record of qualifying carman mechanic's days from January 1, 1940 to date shall be determined, and if in the future he adds to such record sufficient qualifying days of service rendered at a temporary carman mechanic's rate of pay to reach total of 1160 such days, he shall be entitled to make further election as to whether he desires a carman mechanic's seniority date in the same manner as provided in Section Third hereof.

Notices of the provisions of this section of this agreement shall be posted on the employees' bulletin boards

at all locations for period of fifteen days from the effective date of this agreement. These notices so posted shall be deemed to be full and sufficient notice to carman helpers as specified of the provisions of this agreement whereby they may, if they so desire, obtain carman mechanic's seniority date if they have the qualifying days of service rendered at a carman mechanic's rate of pay, or, if not, then to have the number of such qualifying days to be credited to them for future consideration, and not otherwise.

A carman helper coming under the provisions of this section must submit his request for consideration as provided herein to local management in writing, bearing his personal signature and witness thereto, and copy furnished to local committee within the time limit herein specified of fifteen days after the effective date of this agreement.

FIFTH:

A carman helper who upon qualifying as a carman mechanic under the provisions hereof and who does not elect to accept a permanent carman mechanic's seniority as provided in Section Second and Section Third hereof, shall be returned to his former position as a carman helper as soon as the local management and local committee can agree upon replacement to fill position he has been holding as a temporary carman mechanic.

SIXTH:

The provisions of this agreement shall apply to returning veterans who were promoted to temporary carman mechanics under the provisions of the agreement dated August 29, 1944, prior to their enlistment

or induction in the armed forces of the United States, under the Selective Training and Service Act of 1940 and the Selective Service Act of 1948, and when they returned to service and complete the remainder of the days' experience as provided in Section First of this agreement.

SEVENTH:

All of the provisions of the Memorandum of Agreement dated August 29, 1944 between the Lehigh Valley Railroad Company and System Federation No. 96, Railway Employees' Department, A. F. of L., to which the Brotherhood Railway Carmen of America was a party. Sections 1 to 12, inclusive, with the exception of Section 11 as modified by this agreement, shall continue in full force and effect for employees of the Carmen's Craft represented by Brotherhood Railway Carmen of America, until changed in accordance with the procedure required by the Railway Labor Act.

EIGHTH:

This Memorandum of Agreement shall be effective March 1, 1949 and shall continue in full force and effect until changed in accordance with the procedure required by the Railway Labor Act.

Accepted for:

BROTHERHOOD RAILWAY CARMEN OF AMERICA:

By /s/ GEORGE E. SELLERS,

General Chairman

Accepted for:

LEHIGH VALLEY RAILROAD COMPANY:

By /s/ C. L. WAGNER,

Chief of Personnel

LEHIGH VALLEY RAILROAD COMPANY

AGREEMENT BETWEEN THE LEHIGH VALLEY RAILROAD CO. AND SYSTEM FEDERATION NO. 96, EFFECTIVE NOVEMBER 1, 1942.

* * * *

Rule 27
Reduction of Forces.

When it becomes necessary to reduce expenses, the force at any point or in any department shall be reduced, seniority as per Rule 31 to govern; the employees affected to take the rate of the job to which they are assigned.

Four days' notice will be given employees affected before reduction is made and lists will be furnished the local committee.

In the restoration of forces, employees will be restored to service in accordance with their seniority if available within a reasonable time and shall be returned to their former positions if possible. The local committee will be furnished with a list of employees to be restored to service.

Employees restored to service will not be laid off again without the four days' advance notice provided in this rule.

In reducing the force the ratio of apprentices will be maintained.

* * * *

Rule 31.

Seniority.

Seniority of employees in each craft covered by this agreement shall be confined to the point employed in the Maintenance of Equipment Department and there shall be four subdivisions of the Carmen as follows:

Pattern Makers
Upholsterers
Painters
Other Carmen

The seniority lists will be opened to inspection and copy furnished the committee.

Rosters will be compiled and posted in January of each year and will be open for correction for a period of sixty (60) days after being posted. If no exceptions are taken to a roster date within the sixty day period after it is first posted, the date will be considered as correct and not changed thereafter. Copy of the rosters of each point will be mailed to Secretary of the Federated Shop Craft Committee.

* * * *

Rule 120.

Qualifications.

Any man who has served an apprenticeship or who has had four (4) years' practical experience at carmen's work and who with the aid of tools, with or without drawings, can lay out, build or perform the work of his craft or occupation in a mechanical manner, shall constitute a carman.

Rule 121.

Classification of Work.

Carmen's work shall consist of building, maintaining, dismantling (except all wood freight train cars), painting, upholstering and inspecting all passenger and freight cars, both wood and steel, planing mill, cabinet and bench carpenter work, pattern and flask making and all other carpenter work in shops and yards, except work generally recognized as bridge and building department work; carmen's work in building and repairing motor cars, lever cars, hand cars and station trucks; building, repairing, and removing and applying wooden locomotive cabs, pilots, pilot beams, running boards, foot and headlight boards; tender frames and trucks, pipe and inspection work in connection with air brake equipment on freight cars; applying patented metal roofing; operating punches and shears, doing shaping and forming; work done with hand forges and heating torches in connection with carmen's work; painting, varnishing, surfacing, decorating, lettering, cutting of stencils and removing paint (not including use of sand blast machine or removing vats); all other work generally recognized as painters' work under the supervision of the locomotive and car departments, except the application of blacking to fire and smoke boxes of locomotives in engine houses; joint car inspectors, car inspectors, safety appliances and train car repairers; oxy-acetylene, thermit and electric welding on work generally recognized as carmen's work; and all other work generally recognized as carmen's work.

* * * *

Rule 126.

Inspectors.

Men assigned to inspecting must be able to speak, write and read the English language, and have a fair knowledge of the A.A.R. (Association of American Railroads) rules and safety appliance laws, including the railroad company general rules.

Rule 127.

Inspectors and other carmen in train yards may be required to take record, for conducting transportation purposes, of seals, commodities or destination of cars in connection with carmen's duties.

* * * *

5. [Caption omitted]

Counter Affidavit

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF } ss.

PAUL W. DIEHL, JR., having been duly sworn according to law, deposes and says as follows:

This affidavit is submitted in answer to affidavit of C. L. Wagner filed on behalf of defendant.

Defendant's affidavit alleges that separate rosters were maintained for each subdivision of the carmen and that no man could maintain his name on more than one roster. This was true prior to the agreement between defendant and System Federation No. 96, dated August 29, 1944, which provided that "Helpers in any craft promoted to mechanics' positions subsequent to January 1, 1940, will be placed on a desk seniority roster as

of the date they were promoted; * * *." After that date my name was carried on the "desk seniority roster" of mechanics and the regular helpers roster.

The phrase "set-up" used in the Complaint denotes that I was advanced to a higher position, namely, that of carman mechanic, without having completed the requirements necessary to acquire seniority in that position. The position was the regular established position in the employ of the defendant and was not a temporary position. When advanced I began to acquire time towards the ultimate aim of acquiring seniority in the position. Rule 120 of the 1942 Agreement between defendant and System Federation No. 96 provided that "Any man who has served an apprenticeship or who has had four (4) years practical experience at carmen's work and who with the aid of tools, with or without drawings, can lay out, build or perform the work of his craft or occupation in a mechanical manner, shall constitute a carman." When "set-up" I began to acquire time towards the four years necessary under this rule.

When re-employed on November 12, 1945, I was re-employed in the position which I left to enter the armed forces, namely, that of "set-up Car Inspector." I was still in the position of acquiring time towards obtaining seniority as a carman mechanic.

Defendant has alleged that the provisions of paragraph Second of the 1949 Agreement are the same regardless of whether service was interrupted by service in the armed forces or by illness or leave of absence or any other reason. It is my contention that the provisions speak for themselves and are not ambiguous. I

have no information as to the treatment of non-veteran employees whose service was interrupted by conditions other than service in the armed forces, but the treatment afforded them is immaterial because ther seniority was not protected by the provisions of the Selective Service and Training Act while my seniority is so protected.

/s/ PAUL W. DIEHL, JR.
Paul W. Diehl, Jr.

Subscribed and sworn to before me this
14th day of October, 1952.

.....
Notary Public.

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6. [Caption omitted]

Order for Leave to Intervene

AND NOW, to wit, this 7th day of April A.D., 1952, upon motion of William M. Gerber, Esq., of Philadelphia, Pennsylvania, and Richard R. Lyman, Esq., of Toledo, Ohio, its attorneys, leave is hereby granted to System Federation No. 96 of the Railway Employees' Department of the American Federation of Labor, *et al.*, to intervene in the above entitled case, to file for its pleading to the Complaint of the plaintiff, a motion to dismiss said Complaint, and to participate fully in all further proceedings herein as a party defendant.

/s/ GUY K. BARD
J

7. [Caption omitted]

Motion of Intervening Defendants to Dismiss Complaint

Now come the intervening defendants System Federation No. 96 of the Railway Employees' Department of the American Federation of Labor, and Paul C. Yost, Warren A. Shupp, Stanley C. Brinkman, and Stephen J. Pavlinsky, and respectfully move the Court to dismiss the complaint of the plaintiff herein on the grounds of lack of jurisdiction of this Court over the subject matter and failure of said complaint to state a claim upon which relief can be granted, and in support of said motion state as follows:

1. It appears on the face of the complaint that upon his return from the armed forces plaintiff was restored to the position in the employ of defendant Railroad Company which he left to enter the armed forces, was retained in such position for more than one year following such restoration, and was not subsequently discharged therefrom.

2. Whatever reemployment rights plaintiff possessed by virtue of the Selective Training and Service Act of 1940, as amended, necessarily accrued upon his discharge from the armed forces and application to defendant Railroad Company for reemployment; and this action, brought more than six (6) years subsequent to plaintff's reemployment on November 11, 1945, is barred, insofar as it purports to assert such rights, by the applicable statute of limitations of the State of Pennsylvania.

3. It appears that prior to March 1, 1949, plaintiff possessed no right to demand and receive either a permanent position or any seniority status as carman (mechanic); that whatever rights he now possesses to such position and status necessarily spring from the agreement effective March 1, 1949, between the System Federation and defendant Railroad Company; and that this Court lacks jurisdiction of the subject matter over the claim asserted by plaintiff for the reason that exclusive jurisdiction of such claims is vested in the National Railroad Adjustment Board.

4. That the Selective Training and Service Act of 1940, as amended, did not entitle plaintiff, under the circumstances related in the complaint, to the position and seniority status of carmen (mechanic) which he claims.

/s/ WILLIAM M. GERBER
William M. Gerber
1203 Morris Bldg.
1421 Chestnut St.
Philadelphia, Penn.

/s/ RICHARD R. LYMAN
Richard R. Lyman
741 Nicholas Building
Toledo 4, Ohio

Of Counsel:
MULHOLLAND, ROBIE & HICKEY
741 Nicholas Building
Toledo 4, Ohio

8. [Caption omitted]

Motion for Summary Judgment

The plaintiff, Paul W. Diehl, Jr., by his attorneys, GERALD A. GLEESON, United States Attorney in and for the Eastern District of Pennsylvania, and Edward A. Kallick, Assistant United States Attorney in and for the said District, hereby moves the Court to enter summary judgment for the plaintiff, in accordance with the provisions of Rule 56(a) of the Rules of Civil Procedure, on the ground that the pleadings in this case and the affidavits filed by the parties hereto show that the plaintiff is entitled to judgment as a matter of law.

/s/ GERALD A. GLEESON
Gerald A. Gleeson
United States Attorney
/s/ EDWARD A. KALLICK
Edward A. Kallick
Assistant United States Attorney,
Attorneys for Plaintiff

---

9. [Caption omitted]

Affidavit in Support of Plaintiff's Motion for Summary Judgment

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF } ss.

PAUL W. DIEHL, JR., being first duly sworn, deposes and says:

I am the plaintiff in the above captioned case, and have personal knowledge of the facts herein set forth.

This affidavit is submitted in support of plaintiff's motion for summary judgment herein, for the purpose

of showing that there is in this action no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law.

I, Paul W. Diehl, Jr., was employed by the defendant, Lehigh Valley Railroad Company, on June 24, 1942, as a Car Repair Helper and acquired seniority as such under the rules, practices and customs of the company as of that date. In February 1943, I was promoted to the position of "Set-Up Car Inspector". In that position I performed all of the duties of a Car Inspector. This position was not a temporary position but a permanent position in the employ of the defendant company. The defendant company had entered into a collective bargaining agreement with System Federation No. 96, Railroad Employees' Department, American Federation of Labor, on November 1, 1942, which agreement covered the position of Car Inspector. Copy of said agreement is attached to affidavit of C. L. Wagner filed on behalf of the defendant company.

On April 15, 1943, while employed as Car Inspector by defendant railroad company, I was drafted into the military service of the United States.

While I was serving in the armed forces of the United States, defendant railroad entered into a collective bargaining agreement with System Federation No. 96, mentioned above, on August 29, 1944, which provided in part:

> "4. Helpers in any craft promoted to mechanics' positions subsequent to January 1, 1940, will be placed on a desk seniority roster as of the date they were promoted; but this will not affect

their helper's seniority date; they to be carried on the regular helpers' roster as of their original date.

"11. Question of disposition of helpers promoted to mechanics in any craft, subsequent to January 1, 1940, will be disposed of between the General Committee and the Management at the expiration of the present emergency."

The reference to mechanics' positions in paragraph 4 above included the position of Car Inspector, which I occupied when drafted into the military service of the United States. I was placed on the "desk seniority roster" referred to above as of February 1943, the date I was promotedto Car Inspector. The names of Warren Shupp, Stanley Brinkman, and Steve Pavlinsky were placed on said "desk seniority roster" subsequent to the date assigned to me.

On October 20, 1945, I was honorably discharged from the United States Air Force and returned to work for defendant railroad as a "Set-Up Car Inspector". Had it not been for my service in the armed forces, I would have completed 1160 days of service as a "Set-Up Car Inspector" on June 1, 1946. Warren Shupp, Stanley Brinkman and Steve Pavlinsky all completed 1160 days in such position after June 1, 1946. I completed 1160 days of actual service on the job as a "Set-Up Car Inspector" on January 10, 1949, the delay being caused solely by my absence in the military service of the United States. At that time no "Set-Up Car Inspector" had been placed on the carmen's seniority

roster but seniority was still retained on the helpers' seniority roster and the "desk seniority roster", on both of which rosters I was senior to the said Warren Shupp, Stanley Brinkman and Steve Pavlinsky.

On March 1, 1949, defendant railroad and System Federation No. 96, Railway Employees' Department, American Federation of Labor, entered into a collective bargaining agreement in pursuance of Section 11 of the 1944 agreement quoted above, which provided as to helpers who had been upgraded to the position of Carman Mechanic, which position is the same as that of "Set-Up Car Inspector", as follows:

> "FIRST
>
> A carman helper, who was upgraded under the provisions of the Memorandum of Agreement dated August 29, 1944 and who has worked a total of 1160 days at a temporary carman mechanic's rate of pay from date of first upgrading to temporary carman mechanic, which date shall be that subsequent to January 1, 1940, shall be considered eligible to accept or reject permanent carman mechanic seniority date in the following manner:
>
> "SECOND
>
> A carman helper, who has qualified as carman mechanic, as provided in Section First hereof, and is presently working on position of a temporary carman mechanic on the effective date of this agreement, shall be given the opportunity to make an election within fifteen days after the date of his being notified of having worked 1160 days as a

temporary carman mechanic to be placed on the permanent carman mechanics' roster with seniority date as of the effective date of this agreement in the order with other men in which he completed 1160 days' experience as provided in Section First hereof, and if so electing shall forfeit his seniority as carman helper. The election by employee provided herein must be submitted to local management officer in writing, bearing his personal signature and witness thereof, and copy furnished to local committee."

Pursuant to this agreement I was given the option of electing to become a Carman Mechanic and exercised this option within fifteen days after being notified of the election.

In June of 1949 the "Bethlehem Car Inspectors' Seniority Roster" was posted showing seniority status as of March 1, 1949. Said list showed seniority as follows:

Warren Shupp
Stanley Brinkman
Steve Pavlinsky
Paul W. Diehl

Warren Shupp was employed as a helper on September 5, 1942, and, without interruption by reason of military service, completed 1160 days as a Car Inspector on October 25, 1946. Stanley Brinkman was employed as a helper on April 19, 1943, and, without interruption by reason of military service, completed 1160 days as a Car Inspector on December 22, 1947. Steve Pavlinsky

was transferred from Easton as a "Set-Up Car Inspector" and, without interruption by reason of military service, completed 1160 days as a Car Inspector on July 18, 1948.

I requested the defendant railroad company to advance my name on the seniority list above that of Warren Shupp, the first man junior to me who completed his 1160 days of service as an upgraded Carman Mechanic subsequent to June 1, 1946. After considerable negotiation my request was refused. I then consulted the representative of the United States Department of Labor on July 5, 1949. Said representative communicated with the defendant railroad on July 13, 1949. Negotiations regarding my rights as a veteran under the Selective Service and Training Act continued between the representative of the United States Department of Labor and defendant railroad until the railroad finally denied my claim on January 2, 1951. In the meantime I had applied to System Federation No. 96, Railway Employees' Department, American Federation of Labor, the collective bargaining representative of the employees of defendant railroad, to file a grievance on my behalf, but the Union refused to do so on December 30, 1950. On February 26, 1951, my case was referred to the United States Attorney for the Eastern District of Pennsylvania by the representative of the United States Department of Labor, together with a letter from me requesting that legal proceedings

be instituted in my behalf. On November 28, 1951, this suit was brought.

/s/ PAUL W. DIEHL, JR.
Paul W. Diehl, Jr.

Subscribed and sworn to before me
this — day of ——, 1952.

.....
Notary Public

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10. [Caption omitted]

Opinion
Sur Motions to Dismiss

Before Kirkpatrick, Ch. J.

This case is before the Court on motions by the defendant and the intervening defendants to dismiss the complaint. Both sides have filed affidavits, but no substantial issue of fact is raised by them and they are in the main merely explanatory.

The question involved is whether the plaintiff, Diehl, a veteran, is entitled to seniority rights ahead of Yost, Shupp, Brinkman and Pavlinsky, the four intervening individual defendants, non-veterans.

At the time the controversy arose the seniority status of all five men was governed by a Union Agreement dated March 1, 1949, the pertinent sections of which provided in substance that carmen helpers, temporarily upgraded to carmen mechanics' positions (in which category all five of the men then were), could at their election become permanent carmen mechanics, provided they had worked a total of 1160 days at a temporary carman mechanic's rate of pay from the date of

first upgrading "with seniority date as of the effective date of this agreement in the order with other men in which (they) completed 1160 days' experience."

Taking the word "experience" in its ordinary meaning, the plaintiff completed his 1160 days of experience on January 10, 1949. If he had not been drafted and had been able to work continuously in his position of temporary carman mechanic, he would have completed the 1160 days on June 1, 1946. The other four men, the continuity of whose work was not interrupted by military service, all completed their 1160 days after June 1, 1946, but before January 10, 1949.

It is plain that the agreement did not intend that military service was to be counted as "experience" in determining seniority and, therefore, unless the agreement is in contravention of some provision of the Selective Training and Service Act of 1940, the employer's award of seniority to the intervening defendants was proper and the plaintiff's claim must fail.

The Act provides that a returing veteran who has left a position "other than a temporary position" shall be restored "to such position or to a position of like seniority, status and pay" and that he shall then "be considered as having been on furlough or leave of absence during his period of training and service" and shall be restored "without loss of seniority."

The first question is whether the plaintiff, when he returned to his employment, was restored without loss of seniority to the position which he had left. If he was, then unless the Union Agreement in some way operated to impair the seniority status, *to which he was entitled when he returned,* it cannot be held invalid,

there being nothing else in the Act which would upset it.

When the plaintiff left his employment to go into military service he was a carman helper temporarily upgraded to the position of carman mechanic. He had been first employed June 24, 1942, as a carman helper, was advanced to the position of "set-up car inspector," which is the same thing as a temporary carman mechanic, and while in that position was drafted on April 15, 1943. On that date he had seniority *as a carman helper,* running from the date of his first employment, but none at all * as a carman mechanic. Under the Union Agreements and rules, then and since in force, the two positions were entirely separate and distinct, so far as seniority was concerned. When a man moved from one such position to another, he lost all seniority acquired in the old job and had to begin at the bottom in the new one. Thus a man with twenty years continuous employment behind him might, if he accepted promotion to a new job, find himself in seniority behind men with ten years or even less. The retention of seniority rights is often considered preferable to promotion—a fact which accounts for the option to elect not to take the new job which was accorded to the men by the 1949 agreement.

When the plaintiff returned to work on November 11, 1945, he was restored to exactly the position which he had left, namely, "set-up car inspector", or tempo-

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* When the plaintiff was advanced to his temporary position as carman inspector, his name was placed on a "desk seniority roster", but all parties agree that this had no effect upon the seniority which he claims in this action.

rary carman mechanic. He lost no seniority which he had when he left, for he retained seniority as a carman helper dating from his first employment, June 24, 1942, being given seniority credit on that for the time he was in service. This was in exact compliance with the provision of the Act requiring that he be considered as having been on furlough or leave of absence.

When the plaintiff was drafted, the only right he had was that given by Rule 120 under the Union Agreement of 1942, namely, to be promoted to carman mechanic after four years (the equivalent of the 1160 days of the 1944 Agreement) of "practical experience at carmen's work", with seniority as of the day he became a carman mechanic. A temporary assignment as carman mechanic did not affect that right in any way. Nor did the Agreement of 1944, which merely provided that the question of seniority of such temporary employees should be postponed until a later agreement could be effected, as it was, in 1949. There was, of course, the possibility, maybe probability, that he would be able to work continuously and acquire the necessary experience ahead of men who began to get theirs later, but the protection of the Act extends only to employees' rights and was not intended to cover their expectations. To restore the veteran to the rights which he had when he entered military service and which would be lost unless protected is something that the law can do and does, but to restore or compensate or give the equivalent of lost opportunities is something which the law wisely does not attempt.

When the plaintiff was drafted, he had at most a reasonable expectation that he would get on the permanent seniority roster of carman mechanic ahead of the men who are now intervening defendants—an expectation which might have been realized if he had not been in military service. But the Court can give him the advanced seniority which he claims in this action only by a ruling which would mean that no Union Agreement regulating seniority, no matter how long after the veteran's return it is made, is valid unless it provides that military service shall be taken as the equivalent of experience in the craft. The great weight of authority is to the contrary. See *Fries* v. *Pennsylvania Railroad Co.*, 195 F. 2d 445; *Zaversnik* v. *Union Pacific Railroad Co.*, 95 F. Supp. 209; *Seattle Star, Inc.* v. *Randolph*, 168 F. 2d 274.

The complaint may be dismissed.

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11. [Caption omitted]

Judgment

BEFORE KIRKPATRICK, *J.*

AND NOW, to wit: November 12th, 1952, in accordance with Opinion of the Court, it is ORDERED that the above action be and the same is hereby Dismissed.

BY THE COURT:

ATTEST:

/s/ J. A. COMEY
Deputy Clerk

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41

No. 11022

In the United States Court of Appeals For the Third Circuit

PAUL W. DIEHL, JR., *Appellant*

v.

LEHIGH VALLEY RAILROAD COMPANY, ET AL.

Appeal from the United States District Court for the Eastern District of Pennsylvania

JOINT APPENDIX TO SEPARATE BRIEFS OF APPELLE LEHIGH VALLEY RAILROAD COMPANY AND OF APPELLES SYSTEM FEDERATION NO. 96 OF THE RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L., AND PAUL C. YOST, WARREN A. SHUPP, STANLEY C. BRINKMAN AND STEPHEN J. PAVLINSKY

HARRY E. SPROGELL
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Toledo 4, Ohio
Attorneys for Appellees System Federation No. 96 of the Railway Employes' Department, A. F. of L., and Paul C. Yost, Warren A. Shupp, Stanley C. Brinkman and Stanley J. Pavlinsky

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JUN 20 1952

TABLE OF CONTENTS

Page

1. Rules 32; 40, 41, 42, 43; 123; 134, 135, 136, 137, 138, 139; 142 of agreement between the Lehigh Valley Railroad Company and System Federation No. 96 effective November 1, 1942, attached to affidavit of C. L. Wagner (which affidavit together with certain other rules of said agreement appear at pages 7a-24a of Appendix to brief for the appellant herein) 1a

2. Counter affidavit opposing plaintiff's motion for summary judgment 9a

1. Rules 32; 40, 41, 42, 43; 123; 134, 135, 136, 137, 138, 139; 142 of agreement between the Lehigh Valley Railroad Company and System Federation No. 96 effective November 1, 1942, attached to affidavit of C. L. Wagner (which affidavit together with certain other rules of said agreement appear at pages 7a-24a of Appendix to brief for the appellant herein).

Rule 32

Assignment of Work

None but mechanics or apprentices regularly employed as such shall do mechanics' work as per special rules of each craft, except foremen at points where no mechanics are employed.

This rule does not prohibit foremen in the exercise of their duties to perform work.

At points where there is not sufficient work to justify employing a mechanic of each craft, the mechanic or mechanics employed at such points will, so far as capable, perform the work of any craft that may be necessary.

This agreement will not be construed to prevent engineers, firemen, cranemen and operators of steam shovels, ditchers, clam shells, wreck outfits, pile drivers and other similar equipment from making any repairs to such equipment they are qualified to perform when required on line of road.

* * * *

Rule 40

Apprentices

All apprentices must be able to speak, read and write the English language and understand at least the first four rules of arithmetic. Applicants for regular apprenticeship

shall be between 18 and 23 years of age, and, if accepted, shall serve four (4) years of 290 days each calendar year. If retained in the service at the expiration of their apprenticeship, they shall be paid not less than the minimum rate established for journeymen mechanics of their respective crafts. Apprentices shall not work on oxy-acetylene, thermit, electric or other welding processes until they are in the last year of their apprenticeship. In selecting helper apprentices, ability and seniority will govern and selections will be made in conjunction with the respective shop craft committee.

Rule 41

All apprentices must be indentured and shall be furnished with a duplicate indenture by the company, who will also furnish every opportunity possible for the apprentice to secure a complete knowledge of the trade. No apprentice will be started at points where there are not adequate facilities for learning the trade.

FORM OF INDENTURE

This will certify that .....
was employed as.....apprentice by the
.....Railroad at
.....on .....19...., to
serve four years, a minimum of 290 days each.

.....
(Title of officer in charge)

SERVICE PERFORMED DURING
APPRENTICESHIP:

.....
.....
.....

This will certify that on.....19..,
..... completed the course
of apprenticeship specified above and is entitled, if employed by the ..... Railroad to

the rates of pay and conditions of service of.....

.....

(Title of officer in charge)

NOTE:—The above form is to be used both for regular and helper apprentices. (Helper apprentices to serve three (3) years).

Rule 42

The ratio of apprentices in their respective crafts shall not be more than one to every seven mechanics. This not to apply to Pattern and Upholstery Shops.

Two apprentices shall not be worked together as partners.

The distribution of apprentices among shops where general repairs are made on the division shall be as nearly as possible in proportion to the mechanics in the respective trades employed therein.

In computing the number of apprentices that may be employed in a trade on a division the total number of mechanics of that craft employed on the division will be considered.

If within six months a regular apprentice and within three months a helper apprentice shows no aptitude to learn the trade he will not be retained as an apprentice.

An apprentice shall not be dismissed except for just and sufficient cause, before completing his apprenticeship.

Regular apprentices shall not be assigned to work on night shifts, and shall not be allowed to work overtime during the first three (3) years of his apprenticeship.

If an apprentice is retained in service upon completing the apprenticeship, his seniority rights as a mechanic will date from the time of completion of apprenticeship.

Preference will be given to sons of employes in the selection of apprentices up to 80 percent of the number employed.

The number of special apprentices permitted shall not exceed eight (8) at any time; they shall be selected from men between the ages of 18 and 30 years who have had education of such character as to provide them with exceptional qualifications for this nature of service. They shall serve three (3) years of 290 days each calendar year or its equivalent.

They shall receive training in the various departments and in the different classes of work of the crafts in the Maintenance of Equipment Department and may be moved at the discretion of the Management.

If retained in service at the completion of the three (3) year course, the apprentice may choose the craft he desires employment in and shall receive a special rate for a period of one (1) year, at the expiration of which he shall be classified and receive the minimum rate of the craft employed in.

Special apprentices shall receive not less than the rate paid helper apprentices during their first three years; this to apply to such apprentices employed after the effective date of this agreement.

Except as provided for in this rule, special apprentices shall be governed by the rules of this agreement.

Rule 43

(a) An apprentice who fails to maintain the study schedule requirements of two new examinations each month, becomes delinquent in any month in which he is either one or two examinations behind schedule, and he no longer has a perfect record. However such apprentice is still considered in good standing and can clear his delinquency by submitting the required number of new examinations to put himself on schedule again.

(b) An apprentice who accumulates two uncleared delinquencies (two separate months) is still considered in good standing and can clear his delinquencies by submitting the required number of new examinations to put himself on schedule again.

(c) An apprentice who accumulates three uncleared delinquencies (three separate months), is subject to removal from the service after proper investigation is held, as provided for by Rule 37.

(d) An apprentice who removed himself from the service for cause as provided in paragraph (c) after proper investigation is held, as provided for by Rule 37, is given one more opportunity to clear his record under the following conditions:

(1) Within fifteen (15) days after removal from the service such apprentice must personally bring to the officer in charge of the shop point where such apprentice is working a sufficient number of new examinations to put himself on schedule again and in addition, reworked examinations on all lessons on which such apprentice has previously failed to attain a passing grade. These examinations must be in an unsealed and properly stamped envelope or container, so that the officer in charge may inspect the examinations.

(2) After complying with the requirements of item (1) such apprentices will then be reinstated.

(e) If an apprentice accumulates three uncleared delinquencies a second time, he will be given an investigation as provided for by Rule 37, and if it is proven that such apprentice was three months delinquent a second time, he will be dismissed as an apprentice.

(f) In connection with the application of paragraphs (c), (d) and (e), it is understood that an apprentice may be excused for failure to live up to the study schedule requirements of his technical training on account of sickness or any other legitimate cause beyond his control. The Apprentice Instructor, in conjunction with the Local Committee, will investigate such cases and will make their recommendations to the supervisory officer as to whether an apprentice should be excused.

(g) An apprentice who is delinquent in his studies when completing his apprenticeship, will not receive his diploma until after he has cleared his record.

(h) Apprentices leaving the service before completing their apprenticeship will be required to return the complete drawing outfit furnished by the Company, to the officer in charge at his station before receiving the final pay due him.

• • • •

Rule 123

Carmen Helpers

Employes regularly assigned to help carmen and apprentices, employes engaged in washing and scrubbing the inside and outside of passenger coaches preparatory to painting, cleaning and dyeing cushions; seat backs, curtains, etc.; washing and scrubbing freight cars; cleaning car carpets, draperies, curtains, etc., removing of paint and varnish on other than passenger cars preparatory to painting, car oilers and packers, operators of bolt threaders, nut tappers, drill presses and punch and shear operators (cutting only bar stock and scrap) heating and holding on rivets, striking chisel bars, side sets, and backing out punches, using backing hammer and sledges in assisting carmen in straightening metal parts of cars, rebrassing of cars in connection with oilers' duties, coating and cleaning journals, repairing and fitting up steam and air hose, assisting carmen in erecting scaffolds, assisting dismantling cars, attending tool room; sand blasting; grinding drills and edge tools; and all other work generally recognized as carmen's helpers' work shall be classed as helpers.

• • • •

Rule 134

Apprentices

Regular apprenticeships will be established in all branches of the trade. Apprentices shall be governed by

the general rules governing apprentices. They will be given an opportunity to learn the trade.

Rule 135

Helper Apprentices

Fifty percent of the apprentices shall be selected from carmen's helpers who have had not less than two (2) years experience at the point employed at the time application for apprenticeship is made. Helper apprentices shall not be over 35 years of age and will serve three (3) years, a minimum of 290 days each service year. Helper apprentices shall be governed by the same rules as regular apprentices. If after the first three (3) months they do not show an aptitude to learn the trade they will not be retained as helper apprentices.

Rule 136

Painter Apprentice

Regular apprentices—Division of time for painter apprentices:

The following schedule for regular apprentices, painter, showing the division of time on the various classes of work, is designed as a guide and will be followed as closely as the conditions will permit:

6 months—Freight car painting.

6 months—Color room, mixing paint.

6 months—General locomotive painting.

12 months—Brush work, passenger equipment.

18 months—Lettering, striping, varnishing, and such laying out and designing as the shop affords.

Rule 137

Schedule of Work Painter Helper Apprentice

Helper apprentices—Division of time for painter apprentices:

The following schedule for helper apprentices, painter, showing the division of time on the various classes of work, is designed as a guide, and will be followed as closely as the conditions will permit:

4 months—Freight car painting.

4 months—Color room, mixing paint.

4 months—General locomotive painting.

10 months—Brush work, passenger equipment.

14 months—Lettering, striping, varnishing and such laying out and designing as the shop affords.

Rule 138

Regular Apprentices, Carmen

The following schedule for regular apprentices, showing the division of time on the various classes of work, is designed as a guide and will be followed as closely as the conditions will permit. Where sufficient passenger car department work is not available without exceeding the regular ratio of apprentices in the passenger car department, apprentices will complete their apprenticeship in the freight car department.

18 months—General freight work, wood and steel.

6 months—Air brake work.

6 months—Mill machine work.

18 months—General coach work, wood and steel.

Rule 139

Helper Apprentice, Carmen

The following schedule for helper apprentices, showing the division of time on the various classes of work, is designed as a guide and will be followed as closely as the conditions will permit. Where sufficient passenger car department work is not available, without exceeding the regular ratio of apprentices in the passenger car department, apprentices will complete their apprenticeship in the freight car department.

12 months—General freight work, wood and steel.
6 months—Air brake work.
6 months—Mill machine work.
12 months—General coach work, wood and steel.

* * * *

Rule 142

Miscellaneous

Except as provided for under the special rules of each craft, the General Rules shall govern in all cases.

2. [Caption Omitted]

Counter Affidavit Opposing Plaintiff's Motion for Summary Judgment

STATE OF NEW YORK
COUNTY OF NEW YORK ss.

C. L. WAGNER, being duly sworn according to law deposes and says as follows:

I am Chief of Personnel of Lehigh Valley Railroad Company, defendant in this case, and am duly authorized on its behalf to make this affidavit in opposition to the plaintiff's motion for summary judgment. I have personal knowledge of the facts set out below.

It is not accurate to say that the "desk seniority roster" on which plaintiff's name was entered pursuant to the agreement dated August 29, 1944 also carried the names of qualified mechanics. It did not. Mechanics, i.e. carmen were carried on their own roster—the carmen's roster. The only persons placed upon the "desk roster" were unqualified persons like the plaintiff who by reason of the emergency performed a carman's work.

I am advised by counsel that I cannot express an opinion whether the plaintiff's position as a set-up car inspector was temporary or permanent because to do so would be

to express a conclusion and not a fact. The following facts concerning the plaintiff's position as a set-up car inspector were true, however: his name was not entered on any roster with the name of a qualified carman mechanic. He had no seniority and was not in position to acquire any seniority as a carman mechanic prior to the 1949 agreement. He had no right to become a carman mechanic prior to the 1949 agreement. He performed the work of a carman mechanic and was entered upon the "desk seniority roster" only because of emergencies; had the emergency not prevailed neither of these events would have occurred. The phrase describing his "set-up" in railroad terminology means "temporarily advanced."

It is not accurate to say that the plaintiff was "senior" to Shupp and others on the "desk seniority roster". His name was entered there earlier than the names of Shupp and others but seniority has no meaning except as may be supplied by a labor agreement and the agreements referred to in my original affidavit were the only agreements under which the plaintiff ever could have acquired any seniority whatever.

/s/ C. L. Wagner

Sworn to and subscribed before me this 16th day of October, A.D. 1952.

(seal) /s/ George C. Hamm
Notary Public

Notary Public, State of New York.
Qualified in Queens County.
No. 41-6749300—Certs. Filed, etc.

[fol. 53] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,022

PAUL W. DIEHL, JR., Appellant,

v.

LEHIGH VALLEY RAILROAD COMPANY (DEFT.), SYSTEM FEDERATION NO. 96 OF THE RAILWAY EMPLOYEES DEPARTMENT OF LABOR, and Paul C. Yost, Warren A. Shupp, Stanley C. Brinkman and Stephen J. Pavlinsky (Intervening Defts.)

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued September 15, 1953

Before Biggs, Chief Judge, and Goodrich and Hastie, Circuit Judges

OPINION OF THE COURT—Filed March 3, 1954

By BIGGS, Chief Judge:

This appeal requires a construction of Section 8 of the Selective Training and Service Act of 1940, as amended.[1]

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[1] See 54 Stat. 890, 56 Stat. 724, 58 Stat. 798, 60 Stat. 341. See 50 U.S.C.A. App. § 308. The basic statute will be found at 54 Stat. 885. As amended the Selective Training and Service Act expired in its major part on March 31, 1947. Section 8, however, is saved indefinitely. See Act of June 29, 1946, 60 Stat. 341, § 7. Section 8(c) provides: "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave

[fol. 54] On June 24, 1942, Diehl was employed as a "car-man helper" by the Lehigh Valley Railroad Company. A carman helper's job fell into a sub-class of a division of the craft of "car-men" under a collective bargaining agreement executed by Diehl's union and the railroad. On February 19, 1943, Diehl was promoted to a job of "set-up car-man inspector," the equivalent for our purposes of a "temporary car-man mechanic."

On April 15, 1943, Diehl entered the armed forces. On August 29, 1944, Diehl's union and the railroad entered into an agreement which provided that the seniority status of car-man helpers promoted to temporary car-man mechanics would be determined by the union and the railroad at the expiration of the war emergency. On October 20, 1945, Diehl received an honorable discharge and on November 11, 1945, he re-entered the railroad's employment as a temporary car-man mechanic.

On March 1, 1949, a supplemental contract was entered into between the union and the railroad. The pertinent provision of this contract provided that "A car man helper, who has qualified as a car man mechanic . . . and is presently working on position of a temporary car man mechanic

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of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

The provisions of Section 9(c)(1) of the Selective Service Act of 1948, Act of June 24, 1948, 62 Stat. 615, amended and renamed the "Universal Military Training and Service Act" by the Act of June 19, 1951, 65 Stat. 75, 50 U.S.C.A. App. § 459, are identical with those of Section 8(c) of the Selective Training and Service Act but Section 9(c)(2) of the Selective Service Act of 1948 provides: "It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

on the effective date of this agreement [March 1, 1949], shall be given the opportunity to make an election within 15 days after the date of his being notified of having worked 1160 days as a temporary car man mechanic to be placed [fol. 55] on the permanent car man mechanics' roster with seniority date as of the effective date of this agreement *in the order with other men in which he completed 1160 days' experience* . . . and if so electing shall forfeit his seniority as a car man helper." (Emphasis added.)

Diehl would have completed 1160 days' experience on June 1, 1946, if his employment by the railroad had not been interrupted by his war service. He actually completed 1160 days' experience on January 10, 1949. The four individual appellees completed their 1160 days' experience after June 1, 1946, but before January 10, 1949. The four individual appellees were put on the seniority roster ahead of Diehl purportedly in accord with the quoted provisions of the supplemental contract of March 1, 1949. On November 28, 1951, Diehl filed the suit at bar to have himself placed ahead of the four individual appellees on the seniority roster. The court below dismissed the complaint [2] and the appeal at bar followed.

We need not concern ourselves with the so-called one year limitation proviso in the last sentence of Section 8(c), for the contract of August 29, 1944 provided, as has been said, that the seniority status of car-man helpers promoted to temporary car-man mechanics should be determined by the union and the railroad at the expiration of the war emergency. Diehl was in the armed forces at the time the agreement referred to was made and he was reemployed by the railroad before the supplemental agreement of March 1, 1949 had been executed. He contends that he is entitled to the seniority status as a car-man mechanic that he would have achieved except for the interruption of his employment by his military service. He cites Section 8(c), in particular the phrases which state that the returning veteran must be restored to his employment "without loss of seniority" and gain the "benefits . . . offered by the employer pursuant to established rules and practices re-

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[2] No opinion reported for publication.

[fol. 56] lating to employees on furlough or leave of absence. . . ." Diehl relies on the "escalator" rule cited in such decisions as Fishgold v. Sullivan Drydock and Repair Corp., 328 U. S. 275 (1946); Trailmobile Company v. Whirls, 331 U. S. 40 (1947); Aeronautical Lodge v. Campbell, 337 U. S. 521 (1949); and Oakley v. Louisville & N. R. Co., 338 U. S. 278 (1949).[3] The appellees in support of their position cite other language of Section 8(c), viz, that the returning veteran "shall be considered as having been on furlough or leave of absence" and put a quite different emphasis than does Diehl upon the decisions of the Supreme Court of the United States, of this and of other courts. Both Diehl and the appellees cite legislative history in support of their positions but that history does not illuminate the problem confronting us.

We decide first that the provisions of Section 8 of the Selective Training and Service Act govern. These were preserved when the rest of the Act was repealed. The provisions of Section 8(c) of the Selective Training and Service Act and those of Section 9(c)(1) of the Selective Service Act of 1948 (now known as the Universal Military Training and Service Act) are identical. The statements in Section 9(c)(2) of the latter Act, beginning, "It is hereby declared to be the sense of the Congress . . . [that the returning veteran] shall be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously. . . ."[4] constituted a declaration by Congress as to the meaning

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[3] In Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. at pp. 284-285, it was said:

"Thus he [the returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war . . .

". . . He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence."

[4] The language of Section 9(c)(2) is quoted in note 1 *supra.*

of the provisions of Section 8(c) of the Selective Training [fol. 57] and Service Act and of Section 9(c)(1) of the Universal Military Training and Service Act. Section 9 (c)(2) is a restatement of the escalator doctrine of Fishgold and similar decisions. The provisions of Section 9(c)(1) of the Universal Military Training and Service Act and, therefore, those of Section 8(c) of the Selective Training and Service Act, seem to be at variance with the terms of Section 9(c)(2). It is our duty to reconcile these apparently conflicting pronouncements if we can. In so stating we are not unmindful of the fact that Diehl's rights are to be tested under Section 8 of the Selective Training and Service Act of 1940 rather than under Section 9 of the Universal Military Training and Service Act. But we cannot believe that Congress, having employed words identical in Section 9(c) of the Universal Military Training and Service Act with those of Section 8(c) of the Selective Training and Service Act of 1940, intended any substantial change.

We think, therefore, that we cannot fairly avoid consideration of the provisions of Section 9(c)(2) of the Universal Military Training and Service Act. The latest decisions of the Supreme Court respecting the rights of the returning veteran are embodied in the Aeronautical Lodge and the Oakley decisions, *supra*. In Aeronautical Lodge the Supreme Court resolved a conflict between this court and the Court of Appeals for the Ninth Circuit, referring particularly to our decision in Gauweiler v. Elastic Stop Nut Corp., 162 F. 2d 448 (1947). In that case we held that by reason of a collective bargaining agreement employees, who had been elected union officers, were entitled to a seniority status higher than that of a returning veteran, the collective bargaining agreement having been executed during the veteran's service in the armed forces. This was the problem which was before the Supreme Court and the Court of Appeals for the Ninth Circuit in Aeronautical Industrial Dist. Lodge 727 v. Campbell, 169 F. 2d 252 (1948). In reversing the ruling of the Ninth Circuit in Aeronautical Lodge Mr. [fol. 58] Justice Frankfurter made it clear that in enacting Section 8 of the Selective Training and Service Act Congress was not creating a seniority system for veterans but was recognizing seniority systems created by collective

bargaining agreements, save where their provisions were discriminatory in respect to a returning veteran. See 337 U.S. at pp. 526-527. In the Oakley case, *supra*, Mr. Justice Burton stated that the position to which the returning veteran must be restored was one which "on the moving escalator of terms and conditions . . . would be comparable to the position which he would have held if he had remained continuously in his civilian employment.", citing Fishgold, Aeronautical Lodge and Trailmobile. See 338 U.S. at 283. The Oakley case was decided in 1949 after the enactment of the Selective Service Act of 1948. The language employed by the Supreme Court is substantially similar to that used in Section 9(c)(2) of that Act. See note 1, *supra*.

By the decision in Aeronautical Lodge, as in our Gauweiler case, a special *class* was carved out for employees who became union officials and these were given seniority over returning veterans who were not designated to official union posts. This was done because of the terms of collective bargaining agreements and existing seniority systems. But if we apply literally the test supplied by Oakley we must advance Diehl above the four individual appellees for only so will his position become comparable to that "which he would have held if he had remained continuously in his civilian employment". If we adopt this course we must disregard the provisions of Section 8(c) of the Selective Training and Service Act and of the Selective Service Act of 1948 (the Universal Military Training and Service Act) which provide that the returning veteran "shall be considered as having been on furlough or leave of absence" and shall be "so restored" to his position without loss of seniority. There is a very palpable difference between "furlough" and "leave of absence" and "continuous em- [fol. 59] ployment".[5] If we are to follow the "sense of the

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[5] In Fishgold v. Sullivan Drydock and Repair Corporation, 154 F. 2d 785, 788 (2d Cir.), affirmed 328 U.S. 275 (1946). Judge Learned Hand put this issue succinctly as follows:

"Subdivision (c) confirms the intention so disclosed. As subsection B reads, it would probably be understood to

Congress" as stated by it in Section 9(c)(2) of the Selective Service Act of 1948 (the Universal Military Training and Service Act) and apply literally the interpretation of Section 8(c) of the Selective Training and Service Act in the Oakley case, we must treat "on furlough" and "leave of absence" as the equivalent of "continuous employment".

We cannot reconcile the irreconcilable. Congressional intent as expressed in the actual words of a statute must, we think, be held paramount to an express Congressional interpretation of that statute even in an immediately following clause. It must also be borne in mind that in the Oakley case the Supreme Court was concerned primarily with the application of the so-called one year limitation for the protection of the veteran embodied in the last sentence of Section 8(c). This was the substantial issue before that tribunal for decision. There is no Supreme Court decision which rules the precise question before us. But see the decision of the Court of Appeals for the Seventh Circuit in Fries v. Pennsylvania R. Co., 195 F. 2d 445 (1952). In the instant case the supplemental agreement of March 1, 1949 creates the escalator upon which Diehl must rise to seniority. *Non constat* but that terms of that agreement which are discriminatory to the veteran must be disregarded. But the requirement of 1160 days' experience to be applied in the order in which Diehl completed them "with other men", including the four individual appellees, are [fol. 60] not discriminatory for Diehl is treated precisely as are other workmen in his *class* or working group. The decision of the court below fitted Diehl precisely into the

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restore the veteran only to that same position which he held when he was inducted. That was, however, thought to be unfair; for while he was in the service, there was likely to be such changes in the personnel that when he came back, he might find himself junior to those over whom he had had priority when he left. To remedy this, by an amendment made while the bill was in Congress, he was given the same status that he would have had, if he had been 'on furlough or leave of absence' while he was in the service. How far that differed from his position, had he remained actively at work, does not appear; but clearly the amendment presupposed that a difference there might be."

seniority system created by the March 1, 1949 agreement. He is dealt with on a parity with other employees who are non-veterans. To put him above the four individual appellees would seem to award him a kind of superseniority not contemplated by any statute.

Accordingly, the judgment of the court below will be affirmed.

[fol. 61] In United States Court of Appeals for the Third Circuit

No. 11,022

Paul W. Diehl, Jr., Appellant,

vs.

Lehigh Valley Railroad Company, System Federation No. 96 of the Railway Employees Department of the American Federation of Labor, and Paul C. Yost, Warren A. Shupp, Stanley C. Brinkman and Stephen J. Pavlinsky

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Biggs, Chief Judge, and Goodrich and Hastie, Circuit Judges.

Judgment—Filed March 3, 1954

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

March 3, 1954.

[File endorsement omitted.]

[fol. 62] Clerk's Certificate to foregoing transcript omitted in printing.

[Fol. 63-65] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—Filed May 20, 1954

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 31, 1954.

Harold A. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 22nd day of May, 1954.

[fol. 66] [File endorsement omitted.]

[fol. 67] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 246

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 25, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.